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No. 318

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In the Supreme Court of the United States

OCTOBER TERM, 1961

GREAT LAKES AIRLINES, INC., et al.,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
RICHARD A. SOLOMON,
Attorney.
Department of Justice, Washington 25, D. C.

JOHN H. WANNER,
General Counsel,
JOSEPH B. GOLDMAN,
Deputy General Counsel,
O. D. OZMENT,
Associate General Counsel,
Litigation and Research,
WILLIAM F. BECKER,
Attorney,
Civil Aeronautics Board, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 291 F.2d 354. The findings and order of the Civil Aeronautics Board (Pet. App. 32a-62a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1961 (Pet. App. 29a), and a petition for rehearing was denied on June 15, 1961 (Pet. App.

31a). The petition for a writ of certiorari was filed on August 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Rule 19(g) of the Civil Aeronautics Board's Rules of Practice, petitioners were deprived of a fair hearing in the revocation proceeding before the Board where they were refused permission to recall Board employees to testify as to knowledge they had acquired as to alleged changes in petitioners' conduct of their business.

2. Whether, under the *Jencks* rule, petitioners were deprived of a fair hearing in the revocation proceeding before the Civil Aeronautics Board where they were refused permission to recall certain Board employees more than two years after they had testified in order to inquire whether the employees had made any contemporaneous reports concerning matters to which they had testified, and where only the portion of a witness' testimony shown to have been the subject of his unproduced investigative report, not his entire testimony, was stricken from the record.

3. Whether the Board abused its discretion in issuing a cease and desist order precluding, without geographical limitations, the type of violations found to have been committed rather than confining its order to activities in the specific geographical area in which the violations occurred.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Federal Aviation Act, the Administrative Procedure Act, and the regulations of the Civil Aeronautics Board are set forth in Appendix B to the petition for certiorari (pp. 63a-73a).

STATEMENT

Petitioners are two air carriers, Great Lakes Airlines and Currey Air Transport; the owners of the air carriers, Mr. and Mrs. Hermann; and several service companies and "Skycoach" ticket agencies controlled by the Hermanns. The two air carriers held exemption authority to conduct only infrequent and irregular operations between any two points. The Board found that the two carriers individually had provided and held out to the public a regular and frequent transcontinental service,[1] and, together

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[1] The carriers are of the class known as "Large Irregular" or "Supplemental" carriers, initially authorized to operate irregular and limited services under blanket exemption regulations and orders (see Pet. App. 18a, 19a). In its *Large Irregular Air Carrier Investigation*, 22 C.A.B. 838, the Board ultimately determined that exemption authorization of existing "Supplemental" carriers found to be fit to operate under the new requirements should be supplanted by certificates of public convenience and necessity, but that the exemption authorization of those found to be unfit should be allowed to terminate. The two carriers here involved were in this latter category. The Board's order terminating the prior domestic operating authority of the two carriers was affirmed in *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board*, 291 F. 2d 354 (C.A. D.C.) certiorari denied, 366 U.S. 965, petition for rehearing pending, No. 918, O.T., 1960. The

with various ticket agencies and service companies under the common control and management of the Hermanns, had held out and conducted regular operations as a single integrated carrier without any authority to act as such an entity.[2] The Board found these violations, standing alone, to have been wilful and of such magnitude as to justify revoking the operating authorizations of the two air carriers and ordering all petitioners to cease and desist from engaging in such activities (Pet. App. 36a). In addition, the Board found that petitioners had further wilfully violated the Federal Aviation Act and its regulations by entering into the various control relationships without Board approval, by disregarding the prohibition against combining the operations of irregular carriers in order to effect a regular service, and by not complying with certain ticket agency requirements (Pet. App. 36a-45a).

Board's refusal to issue new certificates for domestic operation to the two carriers was affirmed on June 8, 1961. *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board* (No. 16,165, C.A. D.C.). A Board order terminating the foreign and overseas and intra-territorial exemption authorizations of the two carriers is now pending on appeal. *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board* (No. 16,349, C.A. D.C.).

[2] The petitioners operated "as the 'Skycoach' air travel system" (see *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322), in the same manner as had "North American Airlines," an earlier combination of carriers, ticket agents, and service companies banded together under common control. The Board's enforcement order in the present case is virtually identical to the one entered against the North American group. See *North American Airlines* v. *Civil Aeronautics Board*, 240 F. 2d 867 (C.A. D.C.), certiorari denied, 353 U.S. 941.

The court of appeals unanimously upheld the Board's findings and order against challenges of a lack of substantial evidence, invalidity in various regulations, a denial of fair hearing, and an unduly broad cease and desist order (Pet. App. 1a-28a). Petitioners here do not challenge the merits of the Board's order, as affirmed by the court of appeals, but limit their petition to two contentions: (1) that they were denied a fair hearing under Rule 19(g) of the Board's Rules of Practice and under the rule established in *Jencks* v. *United States*, 353 U.S. 657, and in 18 U.S.C. 3500; and (2) that the Board's order is unduly broad and punitive.

1. Under Rule 19(g) (Pet. App. 70a), private persons must make application for the testimony of Board personnel and the production of Board records in Board proceedings by motion to the hearing examiner, rather than by application for the issuance of subpoenas as otherwise specified in Rule 19 (Pet. App. 68a-69a). Petitioners desired to recall four Board employees to testify in order to clarify certain facts to which other witnesses had testified, to impeach the Board witnesses, and to have the Board witnesses testify as to their knowledge that petitioners had discontinued their "holding out" of frequent and regular service. Petitioners initially requested the examiner to issue subpoenas directed to the Board employees (Pet. App. 46a). The examiner declined to issue the subpoenas. Petitioners thereupon presented applications for the appearance of the employees under Rule 19(g). The examiner also refused this application. The Board approved this re-

jection (Pet. App. 45a-53a), and the court of appeals affirmed (Pet. App. 4a-14a).

2. A total of nine Board investigators appeared as witnesses on behalf of the Office of Compliance during the hearings held in Washington in January and February of 1955. Counsel for the petitioners questioned some of the investigators, but not all, as to whether they had prepared investigative reports. The counsel demanded those reports which were stated to have been prepared. Except in the case of one witness, however, the examiner refused to require production of the reports.

Subsequently, from April 19, 1955 to August 27, 1957,[3] there was a recess in the evidentiary hearings. In the interim, the decision in *Jencks* v. *United States*, *supra*, was handed down.

After the hearings resumed, petitioners again demanded the reports, which had previously been denied, and also sought to recall the investigators not previously interrogated as to whether they, too, had prepared investigative reports.

The examiner held, and the Board and court agreed, that the principles established in the *Jencks* case and in 18 U.S.C. 3500 were applicable to the administrative proceeding before him. Accordingly, he struck the testimony and exhibits of those Board witnesses who had previously testified that they had filed investigative reports, but who did not produce the reports for the petitioners (Pet. App. 54a). The ex-

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[3] The recess was caused by litigation involving the enforcement of subpoenas, and culminating in the decision in *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322.

aminer also struck that portion of the testimony of the witness Flynn involving certain telephone conversations which had been shown to be the subject of an investigative report which had not been produced (Pet. App. 56a; R. 775, 1135-1136). Both the Board (Pet. App. 56a) and the court of appeals (Pet. App. 17a-18a) found that the examiner had not abused his discretion in striking only a portion of Flynn's testimony.

In addition, the examiner, after reviewing the circumstances under which the Board witnesses had testified in 1955, denied petitioners' motion to recall the Board investigators on the ground that the necessary foundation to prove the existence of the investigative reports could and should have been laid in 1955. Both the Board (Pet. App. 53a-56a) and the court (Pet. App. 14a-17a) held that the examiner had not abused his discretion in refusing to recall these witnesses.[4]

3. In ordering petitioners to cease and desist from future violations of the Act and Board Regulations

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[4] The Court of Appeals summarized the situation as follows (Pet. App. 16a-17a):

> "The hearings were drawing to a close. Two of the five witnesses involved were no longer Board employees. One of them lived in Chicago where no hearing was to be held. Had the recall of these five witnesses led to the production of prehearing reports and statements, new avenues of inquiry might have been opened which would have required the calling of rebuttal witnesses. The time lapse between the original testimony and the request for recall was very substantial. The need to finally bring the protracted case to a close undoubtedly, and justifiably, weighed heavily with the examiner."

they had been found to have wilfully violated, the Board framed its order generally, without geographical limitation, and did not limit the prohibitions to the domestic services in which the particular violations had been uncovered (Pet. 59a-62a). The lower court found "without merit" the petitioners' contentions that the Board's order "is too broad and vague and prohibits legal conduct, and that the sanctions specified in that order are unduly punitive" (Pet. 28a).

ARGUMENT

The decision below is a limited one, clearly sustainable on its own facts, which presents no significant issues of general applicability relating to the validity of the Board's Rule 19(g), the application of the *Jencks* rule to administrative proceedings, or the permissible scope of cease and desist orders. Further review by this Court is not warranted.

1. Petitioners contend (Pet. 12-18) that the provisions of Rule 19(g) of the Board's Rules of Practice, providing a procedure by which parties to Board proceedings may seek the attendance of Board employees as witnesses (Pet. App. 70a; see *supra*, p. 5), is in direct conflict with the provisions of Section 6(c) of the Administrative Procedure Act governing agency subpoenas (Pet. App. 67a-68a). The court of appeals rejected this contention. It concluded (Pet. App. 7a-8a) that the requirement of Rule 19(g), that the applicant "set forth the need * * * for such evidence and its relevancy to the

issues of the proceeding," is essentially equivalent to the requirement of Section 6(c) of the Administrative Procedure Act, that there be "a statement or showing of general relevance and reasonable scope of the evidence sought."

Moreover, the court pointed out (Pet. App. 8a) that, even if in certain situations Rule 19(g) might be interpreted or applied to go beyond the scope of Section 6(c), "the fact remains that no such improper requirement was imposed in these proceedings. Petitioner's application was denied under Rule 19(g) on the grounds of irrelevance and unreasonable scope, the grounds which section 6(c) specifies may call for denial of an application."

Thus the court affirmed the Board's findings that Rule 19(g) and Section 6(c) were consistent (see Pet. App. 50a-53a); that petitioners had not made a sufficient showing of new facts for recall of the witnesses or of a valid basis for impeachment of the witnesses (Pet. App. 48a-50a); and that the examiner had not abused his discretion in rejecting petitioners' alleged discontinuance of certain improper practices since petitioners had "direct access to their own employees to produce evidence on that point" and since "the most that the requested witnesses could conceivably have shown would have been negative in character, and therefore not particularly probative" (Pet. App. 50a).[5] As the Board pointed out (Pet.

[5] The Board added that "[e]ven if we are in error in this regard, there would be no sound basis for reopening of the record, since aside from the findings as to 'holding out' violations, the remaining violations are so serious as to warrant the sanction imposed herein" (Pet. App. 50a, n. 28).

App. 50a), petitioners "were not by virtue of Rule 19 (g) deprived of a fair opportunity to adduce relevant and material evidence bearing on the issues in the case." Under these circumstances, there is no warrant for further review of the Board's application of Rule 19(g).

2. Furthermore, there is no issue presented here as to the applicability to administrative proceedings of the principles established in *Jencks* v. *United States*, 353 U.S. 657, and in 18 U.S.C. 3500. The Board readily agreed that the *Jencks* principles are applicable and in fact struck from the present record testimony by Board witnesses who had testified in response to petitioners' inquiries that they had prepared investigative reports which were not subsequently produced upon petitioners' demand (see the Statement, *supra*, p. 6). Moreover, the determination by the Board, affirmed by the court of appeals, that there was no abuse of discretion under the circumstances of this case in the examiner's refusal to recall those government witnesses whom petitioners had not previously chosen to interrogate concerning the possible existence of investigative reports (see the Statement, *supra*, p. 7) clearly does not present any issue of general importance which warrants further review.

Nor are petitioners correct in their contention that Flynn's entire testimony should have been stricken (Pet. 19-20; see Pet. App. 56a), rather than only that portion involving the telephone conversations (see the Statement, *supra*, pp. 6-7). The court of appeals held (Pet. App. 17a) that "[i]n so far as ad-

ministrative proceedings are concerned, the Jencks rule is applicable only as a measure of the fundamentals of fair play," and "that fair play [did not require] that the examiner order the deletion of all of Flynn's testimony." The court of appeals' holding was consonant with this Court's holding in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 29, that the question whether the entire testimony of a witness should be stricken in the event of failure to produce reports directed to only a part of the testimony is a matter resting within the "wide discretion" of the trier of facts.

3. Finally, petitioners charge that the Board's order is unduly broad in that it directs them to cease and desist from certain specified practices in "overseas" and "foreign" air transportation, in addition to the "interstate" air transportation area of their operations in which the various violations were found to have occurred.[6] But the prohibitions of an order need not be confined to the particular geographical area to which the evidence of illegal conduct related. See *United States* v. *United States Gypsum Company*, 340 U.S. 76, 90; *Wilson & Co.* v. *Benson*, 286 F. 2d 891, 896 (C.A. 7); *Maryland Baking Company* v. *Federal Trade Commission*, 243 F. 2d 716, 718 (C.A.

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[6] "Overseas air transportation" is defined by the Federal Aviation Act of 1958 to encompass air service between a United States territory or possession and any state (or the District of Columbia) or other territory and possession (49 U.S.C. 1301 (21) (b)). "Foreign air transportation" is defined to cover transportation between any place in the United States and any place outside of the United States (49 U.S.C. 1301 (21) (c)).

4).[7] The wilful and persistently illegal conduct in which petitioners were found to have engaged did not turn on geographical considerations, and petitioners point to no meaningful distinctions between interstate, overseas, and foreign air transportation which makes a geographically unlimited order unjustified.

[7] *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, is inapposite here, for it does not relate to the question of the geographical scope of an order, as do the cited cases. Rather, *Communications Workers* was concerned with the question whether a party enjoined from committing unfair labor practices with respect to one employer may be enjoined, in the absence of any supporting record evidence, from committing unfair labor practices with respect to any other employer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

JOHN H. WANNER,
General Counsel,

JOSEPH B. GOLDMAN,
Deputy General Counsel,

O. D. OZMENT,
Associate General Counsel,
Litigation and Research,

WILLIAM F. BECKER,
Attorney,
Civil Aeronautics Board.

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No. 318

GREAT LAKES AIRLINES, INC., CURREY AIR TRANSPORT LIMITED, IRVING E. HERMANN and IDA MAE HERMANN, individually and as co-partners, d b a NEVADA AERO TRADES COMPANY, AIR INTERNATIONAL, INC., GREAT LAKES AIRLINES AGENCY, INC., SKYCOACH AGENCY OF NEVADA, INC., SKYCOACH AIRLINES AGENCY OF NEW YORK, INC., SKYCOACH AIRLINES AGENCY OF CHICAGO, INC., SKYCOACH AGENCY OF LOS ANGELES, INC., SUPER SKYCOACH AIRLINES AGENCY, INC., SKYCOACH AIRLINES AGENCY OF DETROIT, INC., and SKYCOACH AGENCY OF SAN FRANCISCO, INC., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

ABE KRASH
1229 - 19th Street, N.W.
Washington 6, D. C.

ROLAND E. GINSBURG
3325 Wilshire Boulevard
Los Angeles 5, California
Attorneys for Petitioners

ARNOLD, FORTAS & PORTER
1229 - 19th Street, N. W.
Washington 6, D. C.

KEATINGE AND OLDER
3325 Wilshire Boulevard
Los Angeles 5, California
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.